Supreme Court, U.S.
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89-938

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CLEMENT J. PACYNA, PETITIONER

v.

DOROTHY M. PACYNA, RESPONDENT

and

CLEMENT J. PACYNA, PETITIONER

v.

LEE G. GREENLEY, JOYCE B. GREENLEY, JOHN LLOYD EGAN, ESQ., and WINTHROP H. PHELPS, ESQ., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether an appeal seeking relief on a direct attack to vacate as void a judgment lacking jurisdiction and procured by fraud, proven by clear and convincing evidence on the face of the record, constituting the judgment a nullity, may be denied on ground it is not final?

2. Whether an appeal seeking relief from property procured by fraud and malfeasance, taken within the time required by law after entry of a final order, may be denied on ground it is untimely?

3. Did the Court of Appeals apply the correct standard of review to petitioner's appeal in light of the intervening circumstances of substantial or controlling effect involving violations of statutory, regulatory and constitutional provisions and substantial prejudice committed against petitioner, relative to the cases at bar, respectively?

CERTIFICATION

The petitioner respectfully seeks allowance of his petition for a writ of certiorari on the concurrent cases at bar, certifying that they are related.

The decisions herein have resulted in substantial prejudice to petitioner and are so severe as to infringe on his Amendment rights.

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OPINIONS BELOW

Re: Pacyna v. Pacyna: The Order/Opinion of the court of appeals (App. A), the Order/without opinion of the appellate division (App. B) and the decision contained in the Excerpt Transcript of the hearing Court (App. C) are not reported.

Re: Pacyna v. Greenley, et al: The Order/Opinion of the court of appeals (App. G), the non final decision (App. I) and the final Order (App. J) of the hearing court are not reported.

JURISDICTION

Re: Pacyna v. Pacyna: The Order of the court of appeals (App. A) denying appeal was entered on September 14, 1989. Petitioner's motion for reargument was denied on October 26, 1989 (App.B).

Re: Pacyna v. Greenley, et al: The Order of the court of appeals (App. E) denying appeal was entered on June 1, 1989. Petitioner's motion for reargument was denied on September 14, 1989 (App. H).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. CONSTITUTION Amend. 1 provides:

No person shall be denied redress.

2. CONSTITUTION, Amend. V and the New

York State's final clause in Article 1,

Section 6 provides:

> No person shall be deprived of life, liberty, or property without due process of law.

3. CONSTITUTION, Amend. XIV provides:

> No person shall be denied equal protection of law, and that no state shall deprive any person of life, liberty or property without due process of law.

4. New York State Civil Practice Law

Rules (CPLR) at pertinent part:

> R304 requires service of summons, complaint, notice.
>
> R306 requires proof of service.
>
> S2212 provides for motions in supreme court.
>
> R2214 requires motion papers; service; time.
>
> R3402 requires a Note of Issue and such other data as may be required by the applicable rules of the court in which the note is filed, to place a case on calendar. (See S1024, below).
>
> R5015 provides: on motion, the court which renders a judgment or order may relieve a party from it upon such terms as may be just ... upon the ground of:

(a)3. fraud, misrepresentation, or other misconduct of an adverse party, or

4. lack of jurisdiction to render the judgment or order, or

5. reversal, vacature of a prior order or judgment upon which it is based.

(d)Restitution, where a judgment or order is set aside or vacated.

§5513(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order appealed from and written notice of its entry, or, ..., except that when such party has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

§5602(a) provides for appeals to the court of appeals by permission upon direct application 1. in an action originating in a supreme court ..., (ii) ~~from a~~ final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601.

5. Rules of the Court of Appeals:

500.11(d) provides permission to appeal in civil cases (1) the moving papers shall be on single document, bound on the left, and shall contain in the or-

der here indicated, (iii) a statement of the procedural history of the case, including a showing of the timeliness of the motion. If the motion for leave to appeal is made directly to this court, without first having moved at the Appellate Division, the moving papers to this court shall demonstrate timeliness by stating the date movant was served with the order or judgment sought to be appealed, with notice of entry.

6. Uniform Calendar and Practice Rules of Appellate Division, 4th Dept., for Erie and Niagara counties, at pertinent part:

§1024.4(a) (at 22 NYCRR) mandates: no case triable without a note of issue, and accompanied by a statement of readiness, and date summons served.

§1024.4(d) mandates: a separate note of issue and statement of readiness shall be filed with respect to each action in which a separate summons was served.

7. New York State Real Property Law (RPL) at pertinent part provides:

§254 for construction of clauses and covenants in mortgages and bonds.

§258 for forms of deeds/mortgages.

§290 for definitions, effect of article re: "real property","purchasers", "conveyance" and "recording."

§291 for recording conveyances, being

duly acknowledged or proof duly certified.

§292 by whom conveyance must be acknowledged or proved.

§293 for recording of conveyance hereto acknowledged or proved.

§306 for certificate of acknowledgment or proof, and §318 for recording.

§329 authorizes court to declare void or invalid and cancel mortgage where it is improperly recorded.

§330 for officers guilty of malfeasance liable for damages.

8. Judiciary Law §487 provides for officers guilty of malfeasance liable for treble damages.

STATEMENT

RE: PACYNA v. PACYNA

In October 1974, Respondent's counsel, JOHN LLOYD EGAN, a co-defendant in Pacyna v. Greenley, et al, a concurrent case hereof, obtained a Judgment of Separation against petitioner, granted by the HON. ALFRED M. KRAMER, Justice Supreme Court, Erie County, on October 23, 1974.

In February 1978, said counsel obtained a Judgment consolidating an action for

Accounting and Divorce. The judgment was based upon and merged the terms of the prior separation decree, which included a money assignment for $6,150.00 against petitioner for alimony, medical, etc. and joint property rental income arrearages.

Although petitioner was in default on the divorce action, he was unaware that there was a fatal jurisdictional defect in the separation decree, infra, on which the divorce decree was based.

Subsequently, money judgments were obtained against petitioner in 1978, 1981, 1985 and 1989, infra, all based on the terms of the divorce decree merged from the separation decree, as aforementioned.

Motions by petitioner's counsel seeking to open for review to cure the separation decree and prior judgments or orders based on same, were referred to as non final or final and were on grounds of irregularities, errors and jurisdiction, etc. The

motions were denied substantially as being meritless, repetitious, frivolous and without basis in law, respectively.

The prior orders appealed from were ultimately dismissed in 1978, 1983 and 1986 by the New York State Court of Appeals as not finally determining the action within the meaning of the Constitution (See App.A).

On May 11, 1988, petitioner's pro se motion for relief from the judgments or orders referred to above, was entertained pursuant to CPLR 2212 and 5015, supra, by the HON. NORMAN E. JOSLIN, J.S.C., Erie County, as Justice Kramer, who granted the Judgment of Separation, supra, had retired from the bench.

Petitioner's motion papers, for the first time, specified, with emphasis added:

"That the motion was not to reopen or open for review or to attack a non final or final judgment of separation, which admits to its validity, but rather to vacate or set aside as void or a nullity the Judgment of Separation, and to vacate all subsequent judgments or orders based on same, and restitution of all monies paid

or owed based on same, upon grounds the court or Judge Kramer lacked jurisdiction to grant the judgment, as the court lacked jurisdiction to entertain trial of a separation action without an underpinning because neither a statutory or regulatory required Note of Issue not Notice of Motion nor Affidavit of proof of service were served or filed but were required by law to place the case on the calendar for trial, and that the action was procured by fraud and brought before the court without same, and which does not admit to its validity, and with proof of evidence on the face of the record."

By an Order filed on June 8, 1988, Justice Joslin denied the motion as barred by res judicata (R-90,91).[1/] Thereafter, petitioner appealed (R-92).[1/]

The denial of the application for relief is the subject of appeal covered in the argument in this case at bar hereinafter.

RE: PACYNA v. GREENLEY, ET AL.

Beginning in 1971, the co-defendant LEE G. GREENLEY entered into a rental agree-

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1. Indicates page(s) to petitioner's record on appeal to the appellate division. A copy of the record was furnished on appeal to the court of appeals.

ment with option to purchase the real property of the petitioner and his wife, Dorothy M. Pacyna, the respondent in the concurrent case at bar Pacyna v. Pacyna (hereafter Pacynas), located at 5208 Genesee Street, Bowmansville, New York.

In September 1977, co-defendants LEE G. GREENLEY and his wife, JOYCE R. GREENLEY (hereafter Greenleys) exercised the option to purchase. A closing statement was entered showing $58,114.60 due the Pacynas or sellers, with a First Purchase Money Bond and Mortgage of $54,000.00 and a sum of $4,114.50 due at the time of closing.

A deed was executed by the Pacyna on 15 and 22 September 1977, respectively, passing Title of their property to the Greenleys for the consideration of $1.00 and more (the Bond and Mortgage and sum of $4,114.60 referred to above).

At the time of closing, neither of the Pacynas were present (or notified) when

the Bond and Mortgage was executed and filed by the Greenleys and proved by their attorney on 26 September 1977.

Significantly, the Bond and Mortgage filed on September 26, 1977 by the Greenleys at the Erie County Clerk's Office, Buffalo, New York and recorded in Liber 7924 at Pages 433,434 is formed between the Greenleys or purchasers naming themselves as Mortgagors, and the co-defendants JOHN LLOYD EGAN, attorney (hereafter Egan) and Winthrop H. Phelps, attorney (hereafter Phelps) naming them as the mortgagees, and not the Pacynas or sellers.

A civil action was commenced in 1983 by the petitioner, followed by an application on 6 February 1984 for an Order granting him Summary Judgment in his first cause of action to void or cancel the mortgage instrument of record improperly recorded and to recast a similar mortgage instrument designating the Pacynas as

mortgagees in common, and a money judgment in favor of petitioner and against Egan and Phelps in the amount of $17,000.00 (to be updated) on petitioner's second cause of action for breach of implied contract, negligence, and malfeasance, together with treble damages, costs and reasonable attorney fees.

The denial of the application is the subject of appeal covered in the argument in this case at bar hereinafter.

ARGUMENT

RE: PACYNA v. PACYNA

The petitioner seeks allowance of his petition for a writ of certiorari for the following independent reasons:

a. The court of appeals has so far departed from the accepted and usual course of judicial proceedings,

b. The court of appeals has so far sanctioned the departure from accepted

and usual judicial proceedings by the appellate division,

c. The appellate division has so far sanctioned the departure from accepted and usual judicial proceeding by the hearing court or Justice Joslin, and

d. The court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The substantive issue in this case is one of jurisdiction or validity of the subject Judgment of Separation, supra.

Where there was no jurisdiction at the outset of the lawsuit by clear and convincing evidence on the face of the record, did the courts below act properly on petitioner's appeal for relief, not to open, but rather on a direct attack to vacate as void or a nullity the judgment, etc.?

To help clarify the issue involving Opening and Vacating, Res Judicata and

Collateral Attack and Void Judgment, the petitioner provides, but not limited to, the following authority taken respectively from the Corpus Juris Secundum (C.J.S.):

Volume 49, Section 265 provides in pertinent part:

"that a petition to vacate or set aside a judgment is based on fatal defects on the face of the record", which does not admit to its validity. "An application to open a judgment admits to its validity."

Volume 50, Section 594 provides in pertinent part:

"In a direct, as distinguished from a collateral, attack on a judgment, the judgment does not, of course, operate as res judicata precluding relief, since the validity and binding effect of the judgment is the very matter in issue on such direct attack."

Volume 50, Section 716 provides in pertinent part:

"A void judgment, such as one rendered by a court not having jurisdiction of the parties or the subject matter, does not merge the cause of action or operate as a bar to further litigation."

THE HEARING COURT DECISION

The hearing court or Justice Joslin's decision (App. D) does not address the

claims made by the petitioner, is wrong on its face, and does not represent a thorough and good faith effort to determine petitioner's application for relief.

The hearing court did not consider the petitioner's direct attack to vacate as void or a nullity the subject Judgment of Separation, etc., on grounds that it lacked statutory jurisdiction, nor did it consider the clear and convincing evidence on the face of the record by the Clerk of the County of Erie, State of New York, and of the Supreme and County Courts, in and for said County, who certified that no note of issue nor notice of motion is on file in that office relative to this case (App. E and App. F), respectively, but which are required by Constitutional, Statutory and Regulatory provisions, infra.

Petitioner vigorously contends that Justice Joslin's opinions in his decision (App. D) are contrary to the great weight

of evidence on the face of the record and Constitutional, Statutory and Regulatory provisions, and are in conflict with prevalent case authorities cited in POINTS, which were raised in petitioner's papers to the hearing court, appellate division and court of appeals, as follows:

POINT I

A JUDGMENT LACKING JURISDICTION, PROVEN ON THE FACE OF THE RECORD, IS NULL AND VOID AND HAS NO LEGAL STANDING

With respect to Justice Joslin's opinion "that Justice Kramer's Judgment of Separation was a final decision "(R-85,line 25):[1/]

As aforementioned, petitioner's application moved to vacate as void Justice Kramer's separation decree on grounds that he lacked subject matter jurisdiction as the separation action itself was not on the court calendar for trial because no statutory and regulatory required Note of Issue and Notice of Motion were served or filed for same, as none existed.

Statutory and regulatory provisions directly to the point are:

a. Article 34 of the State of New York Civil Practice Law Rules at Rule 3402 requires a Note of Issue to place a case on the calendar for trial.

b. Article 22 of the State of New York Civil Practice Law Rules at Rule 2214 requires a Notice of Motion which shall specify the time and place of the hearing on the motion, etc.

c. Rule 1024.4(a) & (d) at 22 NYCRR of the Uniform Calendar Practice Rules, for the Appellate Division, Fourth Department, State of New York, specifically states, respectively:

> "a. No case triable ... may be placed on any calendar for any trial term unless a note of issue, with proof of service, on all adverse parties ... has been filed." (CPLR 306 requires proof of service).
>
> "d. A separate note of issue and statement of rediness or stipulation shall be filed with respect to each action in which a separate summons was served."

As aforementioned, is proof of evidence on the face of the record by the Clerk of the County (and Courts) of Erie certifying to no record on file of a note of issue and notice of motion for a separation action in the case (App. E and App. F).

Under the pains and penalty of perjury, petitioner states that no such note of issue and notice of motion existed or was served or filed, with proof of service, for such a separation action.

Significantly, the respondent herself has signed no papers refuting said claim, as only her attorney has filed papers opposing petitioner's Motion on grounds of res judicata (R-59-83).[1/] However, said attorney did not and cannot furnish such note of issue or notice of motion in the case to put the matter to rest.

Authorities directly to the point are:

a. Molampy v. Valestian, 20 Misc 2d 521, 191 NYS 416, which held: "Where a Note of Issue is not filed, Court proceedings lacking the same constitute a nullity,

conferring no jurisdiction upon the Court. A note of issue is to place a case upon the calendar for trial and to give notice to other party of imminent trial of issue."

b. Royal v. Royal, 66 F.R.D. 424 (D.C.) N.Y., 1975) cited: "Without a jurisdictional underpinning a judgment may not stand."

c. Graciette v. Star, 66 F.R.D. 424 (D. C.N.Y., 1975) held: "A judgment by a court without jurisdiction is subject to collateral attack in any court where its validity is in issue. Fed. Rules Civ. Proc. rule 60(b), 288 U.S.C.A.

d. Davidson v. Ream, 17 AD 362, 164 NYS 1037; Kamp v. Kamp, 59 NY 212; Eastwood v. Premis, 9 AD2d 553, cited: "Lack of jurisdiction renders a judgment utterly void and unavailable for any purpose and an aggrieved party is at liberty in summary proceedings to have the judgment set aside and vacated. Such application to vacate a void judgment does not reverse the judment or consider the merits of the controversy, but rather prevents enforcement or recognition of the void judgment. This right is not affected by the fact that this application is made before a different justice from the one who presided at the time the judgment was granted."

POINT II

JURISDICTION OF THE SUBJECT MATTER, IF NOT CONFERRED BY LAW, CANNOT BE CREATED BY THE PARTIES

With respect to Justice Joslin's opinion

"that in this case there was jurisdiction

because the parties appeared in court with counsel together when the determination took place"(R-87, lines 10-13):[1/]

Authorities directly to the point are:

a. Goldstone v. Payne, 94 F.2d 855 (2d Cir. CA) in part cites: "Courts (Key) 24: A want of jurisdiction over the subject matter of the case cannot be waived by pleading or any form of consent, not even by going to trial." "Where the court lacked jurisdiction over the subject matter of the case, the defect is not cured by getting personal jurisdiction of the defendant."

b. Mason v. Hitchcock et al, 108 F.2d 134 (CA 1st Cir.), held:

(1) "Jurisdiction over the subject matter ..., if not conferred by law, cannot be created by the parties."

(2) "consent of the parties can never confer jurisdiction upon a ... court. Any jurisdictional fact prescribed by the statute is absolutely essential and cannot be waived, and the want of it may be raised at any stage of the cause." U.S. Envelope Co. et al v. Transo Paper Co. et al, D.C. 229 F. 576, 579; Chicago B. & O. Co. v. Willard, 220 U.S. 413, 31 S.Ct. 460, 55 L.ed 521.

c. Rensing v. Turner Aviation Corp., 166 F. Supp. 790, D.C., Ill, 1958, cited: "Jurisdiction of the subject matter" is the fundamental power of the court to hear and decide a cause on its merits; and therefore, is beyond scope of litigants

to Confer." 2/

d. Maxwell v. Benson, 173 F. Supp. 75, D.C. Iowa, 1959, cited: "Jurisdiction in any case is not a matter of consent and agreement between litigants cannot confer it." 2/

e. Consolidated Co. v. Martin, 39 F. Supp. 567, D.C. La., 1941, cited: "Jurisdiction of the subject-matter must arise on the law and not merely by consent of the parties." 2/

f. South Carolina Public Service Authority v. New York Cas. Co., 74 F. Supp. 831, cited: "Actual consent cannot give jurisdiction of subject matter if jurisdiction does not exist." 2/

g. European-American Banking Corp. v. Chock Full O'Nuts Corp., 1981, 109 Misc. 2d 615, 442 NYS2d 715, cited: "Parties agreement not to raise the issue of lack of jurisdiction of civil court of New York on appeal would be ineffective to create jurisdiction where there was no statutory conferral." 2/

POINT III

A WANT OF JURISDICTION IS NOT ESTOPPED AND MAY BE RAISED AT ANY AND ALL TIMES

With respect to Justice Joslin's opinion

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2. The record on appeal and the entire record on file in this case at the Erie County Clerk's Office contains no stipulation of consent by the parties or their attorneys. In addition to lack of jurisdiction claim, this matter was brought on by fraud referred to in POINT IV, C. hereof.

that petitioner's claim is a collateral attack and foreclosed forever (R-87, lines 18-22):[1/]

Authorities citing directly to the point are:

a. Syracuse v. Brown, 73 NYS2d 440; Matter of Walker, 136 NY 20, 32 N.E. 633: "A void judgment binds no one, and attacks on its validity may be entertained at any and all times."

b. Verbeck v. Verbeck, 187 Misc 750, 65 NYS2d 265: "Where the court rendering judgment lacked jurisdiction to do so, the want of jurisdiction may always be asserted and raised, whether directly or collaterally."

c. Lacks v. Lacks, 390 NYS2d 875: "A judgment rendered without subject matter jurisdiction is void and the defect may be raised at any time and may not be waived."

d. See Graciette v. Star and Davidson v. Ream, supra.

e. See C.J.S. §594, supra.

POINT IV

RES JUDICATA DOES NOT OPERATE AS A BAR PRECLUDING RELIEF FOR WANT OF JURISDICTION AND FROM FRAUD

With respect to Justice Joslin's opinion "that petitioner's claims were barred by

res judicata having been raised in prior proceedings"(R-86, lines 16-25):[1/]

A. WITH RESPECT TO RELIEF FOR WANT OF JURISDICTION: Foremost, petitioner's direct attack to vacate as void the purported Judgment of Separation, etc., on grounds of want of jurisdiction, supra, does not operate as res judicata precluding relief.

Authorities directly to the point are:

(1) The basic element of the doctrine of res judicata are further stated in pertinent part in 50 C.J.S., supra, as follows:[3/]

(a) "Section 617 - A Judgment does not operate as an estoppel, does not merge the cause of action, and constitutes no bar to further litigation on the same cause of action, where the judgment is void."

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3. Justice Joslin stated substantially that res judicata is not a bar or does not lie where there is a lack of jurisdiction (R-87, lines 5-10). 1/ Nevertheless, he denied petitioner's application, contrary to his statement.

(b) "Section 617 - Thus a judgment is not res judicata where the court rendering it acted beyond its authority or without jurisdiction of the parties or the subject matter."

(2) Davidson v. Ream, supra, "The Doctrine of Estoppel or res judicata will not lie where the prior judgments or orders were entertained with a lack of jurisdiction. The want of jurisdiction, which is a pure question of law, may be asserted and raised directly or collaterally, either from an inspection of the record itself where offered in behalf of the party claiming it, or upon extraneous proof, which is always admissable for that purpose. (O'Donghue v. Bois, 159 NY 87, 99, 53 N.E. 537,540 and authorities there cited)."

(3) Scopano v. U.S. Gypsum Co., 106 misc 805, 3 NYS 2d 300; Herskovitz v. Travelers, 272 AD 584, 73 NYS2d 851: "Where a party seeks not to review a decision made upon a motion upon the merits, but to have it set aside on ground of lack of jurisdiction or that it was procured by fraud, his remedy is by motion to vacate or have it set aside as void."

(4) As aforementioned, CPLR 5015, a basis of petitioner's application, provides for relief from judgments or orders upon the grounds of lack of jurisdiction to render the judgments or orders and upon fraud, misrepresentation, or other misconduct of an adverse party.

B. WITH RESPECT TO RES JUDICATA: The basic principles of res judicata are familiar as explained above and as follows:

(1) The sole issue in this case, not resolved by this Court, is whether principles of res judicata may bar petitioner's action where the claim is on a pure question of law involving a fatal jurisdictional defect at the outset of the suit, violating his Constitutional rights.

(2) Paramount to this case, is the fact that Justice Joslin's decision (App. D) itself clearly supports that he created jurisdiction in the separation action for Justice Kramer, to satisfy his own ideas, by his absurd opinions, supra, infra.

(3) Justice Joslin did not base his decision on a full and fair opportunity test afforded by other courts on the same subject matter regarding res judicata. Specifically, his decision is absent any finding on petitioner's claims, afore-

mentioned, regarding: (a) no note of issue or notice of motion served or filed; (b) great weight of evidence presented on the face of the record, namely the Clerk's certifying to no such documents on file; and (c) direct attack involving jurisdiction precluding bar by res judicata under any theory of law.

(4) The test calls for a list of factors relative to the doctrine of res judicata used to determine whether the opportunity to litigate an issue not litigated or decided on in the earlier proceedings was thorough enough to make it appropriate to give the issue estoppel effect in the instant action, precluding its relitigation.

(5) The basic elements of the doctrine of res judicata are stated in but not limited to, authorities, as follows:

(a) Dore v. Kleppe, 522 F.2d 1369 (CA 5th Cir., 1976): "Key to deciding whether res judicata applies is a determination of whether second suit involves

the same cause of action as the prior litigation; if the cause of action is different in the second suit the parties are estopped from relitigating only those issues actually and necessarily decided in the first suit." "Res judicata is a principle of public policy and should be applied as to give rather than deny justice."

(b) International Harvester v. O.S.H.R.C., 628 F.2d 982 (CA 7th Cir., 1980): "Action against company ... was not barred by res judicata, since in both prior actions ... the issue was not litigated or decided on its merits."

(c) Lee v. City of Peoria, 685 F.2d 196; Cerbone v. Westchester County, 508 F. Supp. 780; Aetna Life v. McCabe, 556 F. Supp. 1342; and Dunnhausen v. First Nat. Bank, 538 F. Supp. 551: "Res judicata or estoppel principles do not apply where litigant did not have a full and fair opportunity to litigate relevant issue in earlier suit."

(6) As aforementioned, petitioner's prior motions were to open the purported Judgment of Separation and as being final or non final, which admits to its validity; whereas in the instant application, he sought direct attack to vacate as void the judgment based on a fatal jurisdictional defect evident on the face of the record, which does not admit to its

validity (50 C.J.S. §265), supra.

(7) The invalidity of the Judgment of Separation of such nature as to render it void is a valid ground for vacating it, at least if the invalidity is apparent on the face of the record. In this instance it is evident by the Clerk's certified letters (50 C.J.S. §267), the absence of the note of issue and notice on the record, supra, and it was procured by fraud.

(8) Further significant to this appeal, with respect to paragraph (6) above, Justice Joslin did not review the Orders or Motions' papers of the prior proceedings. Because had he done so he would have had to rule differently, in petitioner's favor.

(9) The Orders of the court of appeals on the record themselves presented as a defense by the adverse attorney in opposition at the hearing level, relative to the prior proceedings had, are instead supportive of petitioner's claims above.

(10) The Orders, on the record, of the court of appeals entered May 10, 1983, September 16, 1986 and February 12, 1987 (R-79,80, R-81,82 and R-83) [1/] denied the prior orders appealed from by petitioner, upon the grounds that the orders appealed from did not finally determine the action within the meaning of the Constitution, respectively, as aforementioned.

C. WITH RESPECT TO RELIEF FROM FRAUD: As aforementioned, in addition to want of jurisdiction, petitioner's motion was a direct attack to vacate as void the purported Judgment of Separation, etc., on grounds of fraud, which also does not operate as res judicata precluding relief.

(1) Authorities directly to the point, but not limited to, are:

(a) Graciette v. Star, supra, cited: "Fraud upon the court renders a judgment void. Fed Rules Civ Proc. rule 60(b) 28 U.S.C.A.

(b) Scopano v. U.S. Gypsum Co., supra, cited: "Where a judgment was obtained by fraud a party has leave by motion to set aside the judgment."

(c) Oberlander v. Oberlander, 39 NYS2d 139, cited: "A judgment obtained by fraud or rendered without jurisdiction is void."

(d) CPLR 5015(a) provides for relief from fraud, etc., supra.

(2) On several occasions fraud, misrepresentation, or other misconduct of an adverse party or parties was committed against the petitioner, as follows:

(a) Beginning on September 10 and 11, 1974, when the parties appeared in court together with counsel[4/] by a court "Order Granting Preference" (R-20)[1/] under Calendar Number 74-1573 for an action for divorce (R-21,22)[1/], for which no statutory or regulatory required Summons and Complaint was served or filed with proof of

---

4. Justice Joslin derived his opinion that Justice Kramer had jurisdiction by the parties appearance in court. See POINT II which supports that "JURISDICTION OF THE SUBJECT MATTER, IF NOT CONFERRED BY LAW, CANNOT BE CREATED BY THE PARTIES."

service, pursuant to CPLR 304 and 306 and Rule 1024.4(a), respectively, supra. On the Order itself, obtained by the respondent's attorney, infra, it is noted "No Appears", indicating no appearance by petitioner or his attorney, infra, for the divorce action.

(b) On September 10, 1974, Judge Kramer acting for the State of New York, together with court officers or respondent's attorney, John Lloyd Egan, a co-defendant in Pacyna v. Greenley, et al, a concurrent case at bar hereof, supra, and petitioner's attorney or Saul Lerner, discussed the matter off the record,[2/] after which they proceeded under the divorce Calendar Number 74-1573 for a "demand for separation", referred to in the trial Clerk's Minutes (R-29,32).[1/] Petitioner later learned that the proceeding was flawed, as explained in detail previously hereof, and in par. (c) following.

(c) As the separation action itself was not on the court calendar for trial, the court or Justice Kramer created jurisdiction to hear the matter where no statutory or regulatory required Note of Issue or Notice of Motion with proof of service were served or filed for such action, pursuant to CPLR 3402 and 306 and Rule 1024.4(a) and (d), respectively, supra. Rule 1024.4(d) specifically madates "a separate note of issue shall be filed with respect to each action in which a separate summons is served."

(d) After petitioner was subjected to a two day trial held on September 10 and 11, 1974 for a separation action before Justice Kramer, Justice Kramer granted the subject Judgment of Separation, lacking jurisdiction for the substantive reasons given, supra.

(e) In February 1978, when said attorney Egan together with petitioner's

attorney, Winthrop H. Phelps, a co-defendant in Pacyna v. Greenley, et al, supra, infra, in a subsequent divorce action, different from the prior faulty divorce action in 1974, supra, obtained or allowed, respectively, a Judgment combining an action for Accounting and Divorce (R-38, 44) [1/] prepared by attorney Egan against petitioner, based on a Summons and Complaint (R-34-36), [1/] on grounds of the prior separation decree, proven jurisdictionally void and procured by fraud, supra, and which merged the terms of same.

THE APPELLATE DIVISION ORDER

The appellate division should not have unanimously affirmed, without opinion, the decision of the hearing court (App. C), in light of the overwhelming weight of evidence, facts, Constitutional, statutory and regulatory provisions and case authorities presented on the face of the record, supra, favoring petitioner.

THE COURT OF APPEALS DECISION

For the foregoing reasons, the court of appeals should not have found that the order appealed from does not finally determine the action within the meaning of the Constitution, dismissing petitioner's appeal (App. A).

As the prior trial court or Justice Kramer clearly lacked subject matter jurisdiction at the outset of the suit and the subject Judgment of Separation granted by Justice Kramer was procured by fraud, supra, all decrees, judgments, orders, etc., of that court, and for that matter, all appellate decisions in the action are a nullity (Federal Courts - Key 542, Judgments - Key 16). See Air Transport Assn. v. PATCO, 516 F. Supp. 1108, Affirmed 667 F.2d 316, Ruddies v. Auburn, 261 F. Supp. 648.

Specifically, the court of appeals violated petitioner's First, Fifth and Four-

teenth Amendment rights. Amend. XIV specifically provides:

"that no state shall deprive any person of life, liberty or property without due process of law."

It is not due process of law but rather a deprivation of petitioner's rights when the state's courts did not render fair and just decisions but rather are practicing revolving-door style justice by denying and frustrating appeals and acting to stifle its gross wrongdoings or creating jurisdiction, thusly preventing justice, of general public interest.

RE: PACYNA v. GREENLEY, ET AL

PRELIMINARY STATEMENT

This case at bar should be reversed by itself or fall upon fall of the related preceeding case at bar. The two cases are related by virtue of an "agreement" (App. L), infra.

The "agreement", dated September 21,

1977, was made between the Pacynas in the preceeding case at bar and the co-defendants Egan, who is also involved in the preceeding case, and Phelps, who were the Pacynas attorneys in a purported pending accounting and divorce court action based on the prior Judgment of Separation.

As aforementioned, the deed passing Title to the Greenleys, was signed by petitioner and his wife on September 15 and 22, 1977, respectively.

The Greenleys signed and recorded the Bond and Mortgage on September 26, 1977 on the basis of the "agreement" proved by their attorney, Richard S.F. Gallivan.

The petitioner seeks allowance of his petition for a writ of certiorari for the following independent reasons:

a. The court of appeals has so far departed from the accepted and usual course of judicial proceedings.

b. The court of appeals has so far sanctioned the departure from accepted and usual judicial proceedings by the hearing court, and

c. The court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The substantive question involved in this appeal is whether the court of appeals ruled properly that petitioner's motion is dismissed for failure to demostrate timeliness as required by section 500.11(d)(1)(iii) of that court's Rules of Practice (App. G).

To help clarify the issue involving timeliness at the court of appeals in this case, the petitioner, based on the facts and evidence on the record on appeal, provides the following argument and authority:

a. That the order when granted by the

hearing court or the HON. FRANK R. BAYGER (resigned), J.S.C., Erie County, on June 27, 1985 was then a "non final Order" requiring in its decision execution and recording of an assignment of mortgage by Egan and Phelps, upon which the Complaint shall be dismissed (App. I).

b. That where the order appealed from became a "final order" upon the recording of the assignment on November 1, 1988 and notice of entry of assignment was made on petitioner on November 10, 1988 by Phelps (App. K), and where petitioner submitted and served his appeal papers with proof service on November 29, 1988 and notice by petitioner's appeal papers constituting entry of the assignment was made on all of the respondents on November 29, 1988, petitioner's appeal is within the time (30 days) required by Rule 500.11(d)(1)(iii) and CPLR 5513(b), supra, and his motion for leave to appeal on a direct

appeal from a final determination of the originating (supreme) court to the court of appeals is proper and timely, pursuant to CPLR 5602(a)1(ii), supra.

c. Even though Judge Bayger's Order by itself became a "final order" on November 1, 1988, petitioner's appeal was timely made and in process. To further support his appeal, upon motion for reargument to the court of appeals (APP. H) on June 28, 1989, petitioner served with proof of service on that date on all of the respondents, a copy of the "Final Order" granted by the Hon. Norman E. Joslin, J.S.C., Erie County, on June 13, 1989 (App. J). The Order:

"ORDERED that this Court's finding that the excution and recording of the Assignment of Mortgage Ordered in the order of Judge Bagyer herein having been complied with, the Order therefore is a final order and the Complaint therein is dismissed effective November 1, 1988."

THE HEARING COURT DECISION

The hearing court or Judge Bayger denied petitioner's motion for Summary Judgment together with ancillary monetary relief therein, finding that Egan and Phelps having been named as mortgagees on the above decribed mortgage pursuant to the written "agreement" executed by the Pacynas and Egan and Phelps (App. L).

The petitioner vigorously contends that the hearing court's finding on the face is clearly erroneous, arbitrary and caprocious and contrary to law. It is further contended that the hearing court's decision is not substantially justified as Justice Bayger deliberately applied the wrong standard of review to the "agreement".

A finding is clearly erroneous, when, although there is evidence to support it the reviewing court upon reviewing the entire evidence is left with the definite

and firm conviction that a mistake has been committed. U.S. v. United States Gypsum Co., 333 U.S. 364 (1948).

POINT I

Judge Bayger's finding that co-defendants Egan and Phelps having been named as mortgagees on the described mortgage pursuant to the written "agreement" executed by the Pacynas, is clearly willfully misrepresentative and is in conflict with the facts and law, as follows:

a. The "agreement" (App. L), clearly does not even remotely mention mortgage, mortgagees or assignment of mortgage, either expressed or implied.

b. The "agreement" is not an assignment of mortgage and was not executed by the parties in the manner and form required by law for the execution of an assignment of mortgage, pursuant to Real Property Law (RPL) §254, §258, §290, §291, §292, §293 and §306, respectively, supra.

c. Any agreement to sign a mortgage which is not acknowledged or proved as required by the recording statute is not a conveyance, pursuant to RPL §291. Beak v. Walts, et al, 42 NYS2d 652.

d. The "agreement" never recorded, was merely a separate escrow agent agreement for the handlingof funds derived from the sale of the Pacynas' property in question, pending a purported court action. It was not part of the contract between the Pacynas, the sellers, and the co-defendants Greenleys, the purchasers. Case law holds that a separate agreement is not part of a mortgage. Castelli v. Walton, 112 NYSed 179, Me.- Thompson v. Glidden, 445 A2d 676, Vt.- Blanchard v. Knight, 146 A2d 173, 121 Vt. 29.

e. The co-defendants Egan and Phelps, who used the "agreement" as their defense in this case at bar, were not parties to the mortgage, had no legal

interest in the mortgage, and had or have no legal assignment to take from or to pass to the Pacynas.

f. An error in ruling of the court shall not be disregarded where a substantial right of plaintiff is prejudiced, pursuant to CPLR §2002. Further, the findings of a court may not be upheld if based upon an erroneous finding or view of law. Ritter v. Morton, 513 F.2d 942.

POINT II

Judge Bayger's decision (App. I) to submit Order, which:

"ORDERED upon the execution and recording of an additional Assignment of Mortgage by Attorneys John Lloyd Egan and Winthrop H. Phelps, transferring their interest in the subject mortgage to Clement J. Pacyna and Dorothy M. Pacyna, the Complaint herein shall be dismissed,"

is deceptively misrepresentative of justice, contravenes state and federal statutory and constitutional provisions, and constitutes an abuse of judicial discretion beyond all permissable borders,

for reasons mentioned above, and as follows:

Judge Bayger created his own authority to satisfy his own idea. He had no power, conferred by law, to make an assignment or to order any additional assignment of mortgage, as none existed for the reasons set forth in POINT I above. Therefore, Judge Bayger could only void the Bond and Mortgage and recast it where it is improperly recorded, pursuant to RPL §329. Goettlicher v. Wille, 56 AD 392, 134 NYS 977.

POINT III

Judge Bayger's finding that under the initially required terms of the Pacynas judgment of divorce and therefater judgments for support arrearages by Mrs. Pacyna, the plaintiff has no cause for complaint against any of these defendants, is erroneous, arbitrary, capricious and contrary to the facts and law raised

above and as follows:

a. As aforementioned, upon fall of the prior separation decree, the divorce decree based on same also falls.

b. Assuming for the moment that the divorce decree is valid, the divorce decree grated on February 15, 1978 and Justice Bayger's decision on June 27, 1985 or over six (6) years later, are in substantial conflict.

c. The divorce decree, which bears Egan's name as the preparer of it on his office legal paper, in pertinent part on page 6 in one of its orders thereof, names the Pacynas as mortgagees in common of the subject mortgage on file, where Judge Bayger's decision (App. I) found that Egan and Phelps were the mortgagees, both, of course, which are erroneous for the reasons aforementioned in POINTS above.

d. The reliance on the "agreement" and divorce decree by Egan and Phelps and the

Greenleys, respectively, have interfered with and prevented:

(1) The mortgage formed and recorded in the names of the Pacynas as mortgagees in common since its inception on September 26, 1977, prior to the divorce decree granted on February 15, 1978.

(2) The payment to petitioner of his 50% interest or $234.32 monthly in the mortgage since September 26, 1977.

(3) The payment of the mortgage in full by the Greenleys continuing due and payable on September 26, 1987, pursuant to the terms of the Bond and Mortgage itself and contract between the Pacynas and the Greenleys, or

(4) Renewal (if) authorized by the Pacynas of the mortgage due and payable on September 26, 1987 at a higher interest percentage rate after ten (10) years of the initial mortgage date on September 26, 1977.

(5) Utilization by the petitioner of his equity in the mortgage, or assignment by him of his interest in the mortgage to his heirs or others since 1977.

THE COURT OF APPEALS DECISION

The court of appeals found that petitioner's application for leave to appeal was untimely.

As aforementioned, petitioner vigorously contends that the court of appeals finding is erroneous, arbitrary, capricious and contrary to the facts and statutory and constitutional provisions. It is further contended that petitioner's application under CPLR 5602 was timely, pursuant to Rule 500.11(d)(1)(iii) and CPLR 5513(a).

Significantly, the court of appeals is restricted to entertain appeals on only final orders or judgments pursuant to CPLR 5601(b) (as of right) and CPLR 5602(a)1.(ii) (by permission), supra.

It is clearly evident that the court of

appeals mistakenly based its finding on Judge Bayger's non final order filed on July 23, 1985 instead of petitioner's presenting it when it became final on the notice of entry on November 10, 1988 of the recording of the mortgage made on November 1, 1988 (App. K), or the court's final order granted on June 13, 1989 and filed on June 21, 1989, referring to November 1, 1989 as the effective date of finality (App. J), supra.

Therefore, pursuant to CPLR 5602, the court of appeals could not have entertained appeal of the matter until it first became final effective November 1, 1988.

For the foregoing reasons, this Court should Order:

RE: PACYNA v. PACYNA

1. Reversal of the order of the court of appeals entered on September 14, 1989 (App. A); the order of the appellate division entered on April 14, 1989 (App. C);

and the order of the supreme court, Erie County, Index No. D-93881 entered on June 8, 1988 based on its decision made on May 11, 1988, (App. D).

2. Vacature of the subject Judgment of Separation granted by the supreme court, Erie County, on October 23, 1974, Index Number D-93881 (R-13 - R-17).[1/]

3. Vacature of the Judgment of Accounting and Divorce granted by the supreme court, Erie County, on February 15, 1978, Index No. E-35981.

4. Vacature of the following orders of the supreme court, Erie County, based on, and upon vacature of, the above decrees:

a. Order granted on September 12, 1978, Index No. E-58019, fixing money judgments for $3,000.00.

b. Order granted on July 13, 1981, Index No. E-58019, fixing money judgments for $12,967.41.

c. Order granted on July 24, 1985,

Index No. E-58019, fixing money judgments for $19,345.76.

d. Order granted on February 28, 1989, Index No. D-93881, fixing money judgments for $18,941.87.

5. Restitution of all monies paid or owed on same, pursuant to CPLR 5015(d).

RE: PACYNA v. GREENLEY, ET AL

1. Reversal of the order of the court of appeal entered on June 1, 1989 (App. G).

2. Reversal of the order of the supreme court, Erie County, granted on June 27, 1985, and June 13, 1989 (App. J), Index No. H-34768, based on the court's decision on October 11, 1984 (App. I).

3. Voiding the Bond and Mortgage and Assignment of Mortgage improperly recorded on September 26, 1977 and November 1, 1988 respectively, and recasting a similar mortgage naming Clement J. Pacyna and Dorothy M. Pacyna as mortgagees in common

effective September 26, 1977 and due and payable on September 26, 1987, pursuant to RPL §329.

5 Restitution or payment of damages upon reversal of the above orders, pursuant to CPLR 5015(d) and treble damages (totaling $101,226.00, to date) for malfeasance of officers or Egan and Phelps, pursuant to Judiciary Law §487.

CONCLUSION

It is incongruous, that prevalent judgments and orders have been court granted against petitioner based on the defective subject Judgment of Separation granted in 1974, which lacks jurisdiction constituting a nullity, proven by clear and convincing evidence on the face of the record and which the court of appeals ruled substantially is not final on appeals taken in 1978, 1983, 1986 and 1989 (App.A).

From the foregoing it is clear that the

State of New York Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such departure by the courts below and has decided important questions of federal law affecting the public in general, which has not been, but should be, settled by this Court, and the petition for a writ of certiorari should be granted in the related cases at bar, respectively.

Respectfully submitted:

S/ CLEMENT J. PACYNA

CLEMENT J. PACYNA, Pro se
1151 Wehrle Drive
Williamsville, New York 14221
Telephone: (716) 632-4078

Dated: November 28, 1989

APPENDIX

STATE OF NEW YORK - COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of September A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Dorothy M. Pacyna,
Respondent,

v.

Mo. No. 844

Clement J. Pacyna,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

S/ Donald M. Sheraw
T/ Donald M. Sheraw
Clerk of the Court

B

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of October, A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Dorothy M. Pacyna,
Respondent,

v.

Mo. No. 1207

Clement J. Pacyna,
Appellant.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/ Donald M. Sheraw
T/ Donald M. Sheraw
Clerk of the Court

C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

PRESENT: DILLON, P.J., CALLAHAN, DOERR, BOOMER, LAWTON, JJ.

Dorothy M. Pacyna,
Respondent,

v.

No. 593

Clement J. Pacyna,
Appellant.

The above named Clement J. Pacyna having appealed to this court from an order of the Supreme Court, entered in the Erie County Clerk's office on June 8, 1988 and said appeal having been argued by Clement Pacyna, appellant, there being no brief or argument on behalf of respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from and the same hereby is unanimously affirmed without costs.

Entered: April 14, 1989

S/ Carmen S. Leone
T/ CARMEN S. LEONE, Clerk

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE : PART 21

DOROTHY M. PACYNA,

Plaintiff-Respondent,

v.

CLEMENT J. PACYNA,

Defendant-Petitioner.

D-93881

Excerpt

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50 Delaware Avenue
Buffalo, New York
May 11, 1988

Before: HON. NORMAN E. JOSLIN,
Supreme Court Justice

Appearances:

GEORGE J. NAVAGH, ESQ.
1440 Rand Building
Buffalo, New York
Appearing for the Plaintiff-Respondent

CLEMENT J. PACYNA
1151 Wehrle Drive
Williamsville, New York 14221
Appearing pro se

Valerie Antos, C.S.R.
Official Court Reporter

MR. PACYNA: All right sir. If I may request, respectfully, your memorandum of law on this.

THE COURT: My memorandum will be -- is--

MR. PACYNA: Sir, I beg you, because when I go to -- if I should fail in the state here, and the requirements of the U.S. Supreme Court which I have gone through before, ... they require the decision. Now, I can't hope to type up on the little 6-by-9 petition all of the -- all of the wordings that are -- appear on the transcript here. So if -- if I may have like a page, I don't care if its one page or half a page, where you deny it, your decision and what basis and so forth, I would appreciate that.

THE COURT: Well in non-jury cases, it is often the Court's procedure to announce the decision from the bench. The relevant portion of that decision I think was succinctly stated in there, and I think you'll find it and it's very easy to extrapolate it, and if you wish to prepare an order which simply states that I am affirming or I am making a determination that

Judge Kramer's decision was a final decision and it was -- it stands and there's no basis for this appeal, that's basically all I've said, sir, and I see no reason to write a memorandum decision, because all of your arguments are misdirected.

What they deal with is an attempt to say it's a new motion, and it isn't. The issue of the validity of the Kramer situation stands. And that -- that's the Judgment of the Court.

MR. PACYNA: Sir, there's no case law, there's no statute that you have mentioned, nor Mr. Navagh, to refute or dispute my claims, not one. You're merely using discretionary determination here.

THE COURT: No, I'm saying that the rules of the Court with respect to procedural matters do not bind as far as what transpired here, plus the fact that all of these matters are res judicata. They have either been raised or they have been -- there's

been sufficient time to raise them in prior proceedings, and these proceedings show that the matter has been foreclosed for a variety of reasons. So at this point I do have to get on with the next hearing.

MR. PACYNA: All right. One more statement, sir. In reference to your terminology of res judicata, I'm sure you're well aware of the doctrine of res judicata more than I am. All the case law I have presented -- and I have none to oppose it -- states that res judicata does not -- is not a bar or does not lie where there is a lack of jurisdiction.

THE COURT: Absolutely right, but in this case there was jurisdiction because the parties appeared in court with counsel together when that determination took place. Where res judicata applies, it says that where both parties have had access to the Court on the certain central issues, and

those issues have been decided by the Court, the only way you can seek review is appeal, not by a collateral attack. Yours is a collateral attack. It means it's coming from the side. It's because the time has foreclosed you, and those issues, having once been disposed of by the Court, are resolved forever. Once the parties agree and stipulate in open court, they can't come back years later and say, but I didn't understand that. But I didn't have a good attorney. But there is some other reason why the Court ought not to give finality to it. Res Judicata, it's fundamental in the law, is a rule of finality. If the parties once appear in court, they can't come back later, saying, I could have had other witnesses, I could have done something else, I was misled. I didn't understand. Continually, there's an old statement, that victory is the only justice in which people delight. And I'm

afraid in this case that you aren't happy with what transpired before, but you are bound by it, and it's the ruling of the Court that you are bound by the Kramer decision, and what you're attempting to do at this point is not available to you. So that's the ruling of the Court and you have a right to appeal.

MR. PACYNA: Right sir. Final line: No person, regardless of their status, can legalize an unconstitutional act by agreeing to it. Thank you very much sir.

THE COURT: Well, you're welcome. Gentlemen, I will mark the -- the note of issue will be kept here, the decision of the Court is on the record. I will return your papers, and if there is to be an appeal, you will, of course need to --

MR. NAVAGH: I'll file the order. I'll submit the order and send a copy to Mr. Pacyna.

* * * * * * *

E

(COUNTY SEAL)

COUNTY OF ERIE
COUNTY CLERK'S OFFICE

25 Delaware Avenue
Buffalo,N.Y. 14202
846-8865

GENEVIEVE M. STAROSCIAK
COUNTY CLERK

(other officers)

December 9, 1986

RE: INDEX NO. D-93881 - Pacyna v. Pacyna

I, GENEVIEVE M. STAROSCIAK, Clerk of the County of Erie, State of New York, and of the Supreme and County Courts in and for said County, do hereby certify that a due and diligent search of the file in the above-referenced action has been made on this date; and, that no Note of Issue specifically designated "An Action for Separation" was found therein;

IN WITNESS WHEREOF, I have set my hand and the seal of said County and Courts on this 9th day of December 1986.

S/ Genevieve M. Starosciak
T/ Genevieve M. Starosciak
Erie County Clerk (Seal)

F

(COUNTY SEAL)
COUNTY OF ERIE
COUNTY CLERK'S OFFICE

DAVID J. SWARTS
County Clerk

25 Delaware Avenue
BUFFALO, NEW YORK 14202
846-8865

April 22, 1988

RE: INDEX NO. D-93881 - Pacyna v. Pacyna

I, DAVID J. SWARTS, Clerk of the County of Erie, State of New York, and of the Supreme and County Courts in and for said county, do hereby certify that a due and diligent search of the file in the above-referenced action has been made on this date; and that no Note of Issue specifically designated "An Action for Separation" was found therein; nor was any Notice of Motion for An Action of Separation found therein.

IN WITNESS THEREOF, I have set my hand and seal of said County and Courts on this 22nd day of April, 1988.

S/ David J. Swarts
T/ DAVID J. SWARTS
Erie County Clerk

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of June A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge presiding.

Clement J. Pacyna,
Appellant,

v.

Mo. No. 80

Lee G. Greenley, et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having thereupon had, it is

ORDERED, that the said motion be and the same is dismissed for failure to demonstrate timeliness as required by section 500.11(d)(1)(iii) of this Court's Rules of Practice.

S/ Donald M. Sheraw
T/ Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of September A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Clement J. Pacyna,
Appellant,

v.

Mo. No. 875

Lee G. Greenley, et al.,
Respondents.

A motion for reargument &c to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion insofar as it seeks reargument be and the same hereby is denied; and it is

ORDERED, that the said motion otherwise be and the same hereby is dismissed.

S/ Donald M. Sheraw
T/ Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CLEMENT J. PACYNA,
Plaintiff,

vs.

LEE J. GREENLEY, JOYCE R. GREENLEY, JOHN LLOYD EGAN, ESQ., and WINTHROP H. PHELPS, ESQ.,
Defendants.

TIMOTHY R. LOVALLO, For Plaintiff

RICHARD J. SHERWOOD, For Lee Greenley

RICHARD S.F. GALLIVAN FOR Joyce R. Greenley

JOSEPH J. THOMAS (John L. Egan, of counsel) For John L. Egan

McKEE, PHELPS & BOWMAN (Winthrop Phelps, of counsel) For Winthrop Phelps

DECISION

FILED
ERIE COUNTY
CLERK'S OFFICE
OCTOBER 24, 1984

Frank R. Bayger, J.,

The plaintiff has moved for summary judgment directing reformation of a certain bond and mortgage so as to substitute the plaintiff and his former wife, Dorothy M.

Pacyna, as mortgagees in place of the defendants Egan and Phelps; and granting money damages for those defendants' alleged negligence, malfeasance and breach of contract. The purchase money bond and mortgage in question was given by the defendants Greenley in connection with their purchase of the Pacynas' jointly owned commercial property. The property was sold during the pendency of the Pacynas' protracted matrimonial litigation in which the parties were represented by attorneys Phelps and Eagan (sic) respectively. The attorneys were named as mortgagees pursuant to the Pacynas' prior written agreement which designated those individuals as joint escrow agents to receive and hold any and all funds realized from the sale pending some further agreement of the parties or a dispositive Order of the Supreme Court. The mortgage was also prepared, executed and recorded in that

fashion with the knowledge and consent of attorney James Owens who represented Mr. Pacyna at the closing.

The Pacynas' matrimonial action was thereafter resolved by stipulation of the parties and the entry of a default judgment of divorce against the present plaintiff. Pursuant to that stipulation and the terms of the judgment of divorce, the defendants Eagan (sic) and Phelps paid all escrowed funds thereto received under the Greenley mortgage to Mrs. Pacyna in partial satisfaction of the husband's accrued support arearages and other obligations. An assignment of their mortgage interest to Mr. & Mrs. Pacyna was thereafter forwarded to Mr. Owens but apparently never recorded or delivered to either Pacyna prior to Mr Owens' death. In the meantime, the Greenleys have continued to pay their mortgage payments directly to Mrs. Pacyna as initially required by the terms of the Pacynas'

judgment of divorce and thereafter by Mrs. Pacyna's subsequent judgments for support arrearages. Under these circumstances the plaintiff has no cause for compliant against any of these defendants and upon Messrs Eagan (sic) and Phelps' execution and recording of another assignment of mortgage, the complaint herein shall be dismissed.

Submit order.

DATED October 11, 1984
Buffalo, New York

S/ Frank R. Bayger
T/ Hon. FRANK R. BAYGER
Justice of the Supreme Court

At a Special Term, Part 21, of the Supreme Court of the State of New York, Erie County, held at 50 Delaware Avenue, Buffalo, New York, on June 13, 1989.

PRESENT: HON. NORMAN E. JOSLIN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CLEMENT J. PACYNA,
Plaintiff,

v.

FINAL ORDER

LEE G. GREENLEY,
JOYCE R. GREENLEY,
JOHN LLOYD EGAN, ESQ., and
WINTHROP H. PHELPS, ESQ.,
Respondents.

Index No. H-34768

ERIE COUNTY CLERK'S OFFICE
FILED
JUN 21 1989

Upon the Order of this Court granted on June 27, 1985 by the HON. FRANK R. BAYGER (Resigned from the bench), J.S.C., Erie County, which Order "ORDERED upon execution and recording of an additional Assignment of Mortgage by Attorneys John Lloyd Egan and Winthrop H. Phelps, transferring their interest in the subject mortgage to Clement J. Pacyna amd Dorothy

M. Pacyna the Co plaint herein shall be dismissed", the Assignment of Mortgage executed on November 5, 1985 and recorded on November 1, 1988, recorded in Liber 10179, Page 128 of Mortgages in the Office of the Clerk of the County of Erie by John Lloyd Egan Attorney and Winthrop H. Phelps, Attorney, as joint escrow agents for Clement J. Pacyna and Dorothy M. Pacyna, with offices at 17 Court Street, Buffalo, New York, assignors, in consideration of one Dollar, ($1.00) paid by CLEMENT J. PACYNA and DOROTHY M. PACYNA assignees, hereby assigned unto the assignees, a certain mortgage made by LEE G. GREENLEY and JOYCE R. GREENLEY, his wife, residing at 5208 Genesee Street, Buffalo, New York, given to secure payment of the sum of Fifty-four Thousand and 00/100 Dollars and interest, dated the 26th day of September 1977 recorded on the 26th day of September 1977 in the

Office of the Clerk of the County of Erie in Liber 7924 of Mortgages, at Page 433 covering premises, together with the Bond and obligation described in said mortgage, and the moneys due and to grow due thereon with the interest, to have and to hold the same unto the assignee, and to the successors, legal representatives and assignes unto the assignee forever, and upon all prior pleadings and proceedings heretofore had herein, and due deliberations having been had and in the interest of the parties herein, it is hereby,

ORDERED, that this Court's finding that the execution and recording of the Assignment of Mortgage ORDERED in the Order of Judge Bayger herein having been complied with, the Order therefore is a final Order and the Complaint therein is dismissed effective November 1, 1988.

S/ Norman E. Joslin
T/ NORMAN E. JOSLIN, J.S.C.

ENTER: GRANTED June 13, 1989
Gertrude Schwab, Spec. Dep. Clerk

K

McKEE, PHELPS & BOWMAN
Attorneys at Law

JOHN M. McKEE
WINTHROP H. PHELPS
WALTER D. BOWMAN

SUITE 1730-Liberty Building
420 MAIN STREET
BUFFALO, NEW YORK 14202
(Area Code 716) 856-3534

November 10, 1988

Clement J. Pacyna
1151 Wehrle Drive
Williamsville, NY 14221

Mr. Pacyna:

Enclosed please find the Assignment of Mortgage, which I recorded in the Erie County Clerk's Office on November 1, 1988.

Very truly yours,

S/ Winthrop H. Phelps
T/ Winthrop H. Phelps

WHP/ckc

Enclosure

AGREEMENT

THIS AGREEMENT, made by and between CLEMENT J. PACYNA, of 1151 Wehrle Drive, Williamsville, New York, and DOROTHY M. PACYNA, of 117 Cornell Drive, Depew, New York (owners of premises No. 5208 Genesee Street, Bowmansville, New York), and JOHN LLOYD EGAN, Attorney, and WINTHROP H. PHELPS, Attorney, as joint escrow agents, the latter parties of which are appointed herein as joint escrow agents to hold any and all funds derived from the sale of the aforementioned premises, after deducting the following sums of money at the closing:

1) Payment of a $1,000.00 check plus interest of 8-1/2% from September 4, 1975, payable to DOROTHY M. PACYNA, which represents the monies due and owing pursuant to a promissory note to the said DOROTHY M. PACYNA, said promissory note being dated September 4, 1975.

2) Payment of 5-1/2% brokerage commission

to Theodore Brunea, of Lancaster, New York, which said commission are based upon the final sale price of the aforementioned premises, 5208 Genesee Street, Bowmansville, New York, less brokerage commissions already paid to the aforementioned broker in the sum of approximately $360.00 per year for a period of approximately six and one-half years last passed.

3) All closing costs and attorney fees due and owing JAMES E. OWENS, attorney on the closing of the aforementioned premises known as 5208 Genesee Street, Bowmansville, New York.

That following the closing of said premises and after deducting the aforementioned sums of money, said funds as aforementioned, the balance there of, shall be held in a joint checking account and/or savings account in the joint names of said escrow agents, and said funds shall be kept and retained in said joint checking account

and/or savings account in the names of both escrow agents pending the receipt by said escrow agents of a stipulation and/or agreement entered into by both parties (CLEMENT J. PACYNA and DOROTHY M. PACYNA), as to the distribution of such funds and/or pending further order of the Supreme Court of Erie County, New York, as to the distribution of the aforesaid escrowed funds, wherein a Supreme Court action is presently pending seeking an accounting of the aforementioned funds, including any and all rental funds, income funds derived from the ownership of said property, and/or the sale of said property.

It is further agreed by both parties (CLEMENT J. PACYNA and DOROTHY M. PACYNA) that said parties will simultaneously execute a deed to effectuate the sale of said premises, and neither of the said parties in any way will frustrate the orderly closing of said premises.

DATED: September 21, 1977.

S/ Clement J. Pacyna
T/ CLEMENT J. PACYNA

S/ Dorothy M. Pacyna
T/ DOROTHY M. PACYNA

S/ John Lloyd Egan
T/ JOHN LLOYD EGAN

S/ Winthrop H. Phelps
T/ WINTHROP H. PHELPS